

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YU XIANG LIN	:	DETERMINATION
	:	DTA NO. 818365
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
August 6, 1999.	:	

Petitioner, Yu Xiang Lin, 88 East Broadway, #B-12, New York, New York 10002, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended August 6, 1999.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 5 Penn Plaza, New York, New York on February 7, 2002 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Paula Tunkel).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether petitioner was a person in possession of or had control of 80 cartons of unstamped or unlawfully stamped cigarettes and, as such, is liable for a penalty in the sum of \$7,000.00 imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

1. On August 6, 1999, investigators from the Division of Taxation's ("Division") Petroleum, Alcohol and Cigarette Tax Bureau were conducting random retail investigations/inspections of various businesses located in a mall at 88 East Broadway, New York, New York. Business was being conducted at this location via a walk-through flea market

type of operation. While approaching a store that sold cigarettes, one of the Division's investigators noticed cigarettes under a display counter of a calling card booth, notwithstanding the fact that the glass-top portion of the calling card booth was covered with advertising posters thus making it difficult to see what was beneath the counter.

2. The Division's investigators received permission from the clerk working at the booth to inspect the cigarettes and they found a total of 80 cartons of cigarettes, all of which were untaxed.¹ The clerk working at the booth, May Lin, was the daughter of petitioner, Yu Xiang Lin, the owner of the calling card booth. With the assistance of an interpreter, the investigators instructed Ms. Lin to call her father and request that he come to the booth. The 80 cartons of unstamped or unlawfully stamped cigarettes were seized by the investigators and when petitioner appeared at the booth he was issued four summonses, returnable on November 1, 1999 at New York County Criminal Court, for the possession and sale of untaxed cigarettes. The criminal charges brought against petitioner in New York County Criminal Court with respect to the 80 cartons of unstamped or unlawfully stamped cigarettes were reduced to two counts of disorderly conduct in satisfaction of all charges and petitioner was sentenced to a fine of \$445.00.

3. On June 5, 2000, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty in the sum of \$7,000.00. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$100.00 per carton for 70 cartons of unstamped or unlawfully stamped cigarettes. Although 80 cartons of untaxed cigarettes were found, Tax Law § 481(1)(b) provides that the penalty of \$100.00 per carton be imposed for every carton in excess of 10 cartons of unstamped or unlawfully stamped cigarettes. Petitioner filed a timely petition contesting the Notice of Determination² and this proceeding ensued.

¹ The investigative report reveals that the 80 cartons consisted of "64 Virginia stamped and 16 in bond."

² Petitioner was also issued an assessment for his failure to obtain a valid Certificate of Registration to sell cigarettes and tobacco products; however, this assessment was not protested by petitioner and is therefore not at issue in this proceeding.

4. Petitioner immigrated to the United States from China in 1990 and he has a very limited understanding of the English language. In addition to operating the calling card booth, petitioner also works a full-time job at a restaurant where, over the last three years, he averaged a yearly salary of \$22,600.00. Petitioner began selling cigarettes only shortly before the Division's investigation/inspection on August 6, 1999 when an individual, unknown to petitioner, approached the calling card booth with an offer to sell him cigarettes at a cost of \$12.00 a carton. Petitioner was unaware of the fact that the cigarettes which he purchased from this unknown individual were not properly stamped. In fact, petitioner was not knowledgeable regarding the requirements of the Tax Law with respect to the taxation of cigarettes and he was unaware of the need to register with the Division to sell cigarettes or that cigarettes are required to be stamped. Petitioner sold the cigarettes which he had purchased from this unknown individual for \$13.00 a carton, thus generating a profit of only \$1.00 per carton.

SUMMARY OF PETITIONER'S POSITION

5. Petitioner does not dispute that he was a person in possession and control of unstamped or unlawfully stamped cigarettes; however, he maintains that he was unaware of the provisions of the Tax Law with respect to the sale and taxation of cigarettes and that his violation of the law was committed out of ignorance and was not done intentionally. Since he sold illegal cigarettes for only a short period of time and generated very little profit from the sale, petitioner believes that there is sufficient basis to cancel or reduce the penalty. Finally, petitioner notes that since the investigation/inspection of August 6, 1999 he has not sold cigarettes nor has he been in possession or control of unstamped or illegally stamped cigarettes.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b) provides, in pertinent part, as follows:

the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. There is no dispute in the instant matter that petitioner was a person in possession or control of unstamped or unlawfully stamped cigarettes and that the Division properly imposed a penalty against petitioner pursuant to Tax Law § 481(1)(b). Considering the specific facts of this case, I believe that it is fair and equitable (Tax Law § 2012) to reduce the penalty from \$100.00 to \$50.00 per carton for each carton in excess of 10 cartons of unstamped or unlawfully stamped cigarettes found in petitioner's possession or control. Accordingly, the penalty imposed pursuant to the Notice of Determination dated June 5, 2000 is hereby reduced from \$7,000.00 to \$3,500.00 (\$50.00 x 70 cartons).

C. The petition of Yu Xiang Lin is granted to the extent indicated in Conclusion of Law "B"; the Division is directed to modify the Notice of Determination dated June 5, 2000 consistent with the conclusions reached herein and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
May 2, 2002

/s/ James Hoefer
PRESIDING OFFICER